

Letter of Findings: 04-20140025
Gross Retail Tax
For the Years 2010, 2011, and 2012

NOTICE: IC § 6-8.1-3-3.5 and IC § 4-22-7-7 require the publication of this document in the Indiana Register. This document provides the general public with information about the Department's official position concerning a specific set of facts and issues. This document is effective on its date of publication and remains in effect until the date it is superseded or deleted by the publication of another document in the Indiana Register.

ISSUES

I. Gross Retail Tax – Diesel Fuel Sales.

Authority: IC § 6-2.5-2-1; IC § 6-2.5-7-3(b); IC § 6-2.5-8-8; IC § 6-2.5-8-8(a); IC § 6-2.5-8-8(d); IC § 6-2.5-9-3; IC § 6-8.1-5-1(b), (c); Lafayette Square Amoco, Inc. v. Indiana Dep't of Revenue, 867 N.E.2d 289 (Ind. Tax Ct. 2007); [45 IAC 2.2-8-8\(d\)](#); [45 IAC 2.2-8-12](#); [45 IAC 2.2-8-12\(e\)](#); 45 IAC § 2.2-8-12(f).

Taxpayer argues that it was not required to collect sales tax from customers who purchased diesel fuel on the ground that the customers were engaged in interstate commerce.

II. Constitutional Due Process – Sales Tax Assessments.

Authority: U.S. Const. amend. V; U.S. Const. amend. XIV; IC § 6-8.1-5-1(c); Sales Tax Information Bulletin 15 (August 2009); John E. Nowak & Ronald D. Rotunda, Constitutional Law (5th ed. 1995).

Taxpayer maintains that the sales tax assessment violates its constitutional due process rights.

III. Fraud Penalty.

Authority: IC § 6-8.1-10-4; [45 IAC 15-5-7](#); [45 IAC 15-11-4](#).

Taxpayer challenges the Department of Revenue's decision imposing a 100 percent fraud penalty stemming from Taxpayer's purported failure to collect tax on the sale of diesel fuel.

STATEMENT OF FACTS

I. Gross Retail Tax – Diesel Fuel Sales.

DISCUSSION

Taxpayer sells diesel fuel maintaining four pumps which dispense diesel fuel without including sales tax in the price charged. These four pumps are marked "Trucks Only" and – according to the audit report – were "intended for exempt truck use only." The Department's audit reviewed transactions which occurred at these four pumps.

During the audit, Taxpayer was provided an opportunity to locate and provide customer exemption certificates. The report noted that "[T]axpayer did provide a large quantity of exemption certificates" However, the audit found that many of the certificates could not be accepted for the following reasons.

Missing address information – almost none of the certificates contained the complete address information for the customer seeking exemption.

Missing signatures – several [certificates] contained no signature.

Invalid signatures – Famous and/or fictitious names – these included signatures signed by Barack Obama, Barbara Bush and Elmer Fudd among others. Repeated signatures – a single individual signed the same name to a number of certificates purportedly from several different companies across the United States.

Illegible certificates – certificates with information that was impossible to read.

As authority for rejecting certain of the certificates, the audit cited to 45 IAC § 2.2-8-12(f) which states:

An exemption certificate issued by a purchaser shall not be valid unless it is executed in the prescribed and approved form and unless all information requested on such form is completed.

In addition, the audit cited to IC § 6-2.5-8-8(d) which provides:

A seller that accepts an incomplete exemption certificate under subsection (a) is not relieved of the duty to collect gross retail or use tax on the sale unless the seller obtains:

- (1) a fully completed exemption certificate; or
- (2) the relevant data to complete the exemption certificate; within ninety (90) days after the sale.

For those transactions in which no properly prepared exemption certificate was provided, the audit assessed Taxpayer for the uncollected sales tax. However audit also determined that "[a]ll exemption certificates which were valid were accepted and those customers removed from the taxable sales."

The Department notes that all tax assessments are presumed to be accurate and the taxpayer bears the burden of proving that any assessment is incorrect. IC § 6-8.1-5-1(b), (c); Lafayette Square Amoco, Inc. v. Indiana Dep't of Revenue, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007).

Indiana imposes sales tax under IC § 6-2.5-2-1, which states:

- (a) An excise tax, known as the state gross retail tax, is imposed on retail transactions made in Indiana.
- (b) The person who acquires property in a retail transaction is liable for the tax on the transaction and, except as otherwise provided in this chapter, shall pay the tax to the retail merchant as a separate added amount to the consideration in the transaction. The retail merchant shall collect the tax as agent for the state.

(Emphasis added).

Most relevant in this case, is that in the absence of valid exemption certificates, [45 IAC 2.2-8-8\(d\)](#) makes it clear that Taxpayer bears the burden of proving that sales tax was remitted to the state or that Taxpayer's customers did indeed use the diesel fuel for exempt purpose.

IC § 6-2.5-7-3(c) specifically requires retail merchants who sell special fuel from metered pumps – such as Taxpayer and other diesel fuel vendors – to collect and retain exemption certificates from customers when those customers makes exempt purchases. In the absence of a properly executed exemption certificates, the sales are deemed taxable:

- (a) With respect to the sale of gasoline which is dispensed from a metered pump, a retail merchant shall collect, for each unit of gasoline sold, state gross retail tax in an amount equal to the product, rounded to the nearest one-tenth of one cent (\$0.001), of:

- (1) the price per unit before the addition of state and federal taxes; multiplied by

- (2) seven percent (7[percent]). The retail merchant shall collect the state gross retail tax prescribed in this section even if the transaction is exempt from taxation under [IC 6-2.5-5](#).

- (b) With respect to the sale of special fuel or kerosene which is dispensed from a metered pump, unless the purchaser provides an exemption certificate in accordance with [IC 6-2.5-8-8](#), a retail merchant shall collect, for each unit of special fuel or kerosene sold, state gross retail tax in an amount equal to the product, rounded to the nearest one-tenth of one cent (\$0.001), of: (1) the price per unit before the addition of state and federal taxes; multiplied by (2) seven [percent]. Unless the exemption certificate is provided, the retail merchant shall collect the state gross retail tax prescribed in this section even if the transaction is exempt from taxation under [IC 6-2.5-5](#).

(Emphasis added).

The language of IC § 6-2.5-7-3(b) is unequivocal in its requirement that Taxpayer collect exemption certificates for its exempt sales of special fuels such as diesel fuel.

IC § 6-2.5-8-8 contains provisions governing exempt transactions and the vendors responsibility to collect or pay the tax:

- (a) A person, authorized under subsection (b), who makes a purchase in a transaction which is exempt from the state gross retail and use taxes, may issue an exemption certificate to the seller instead of paying the tax. The person shall issue the certificate on forms and in the manner prescribed by the department. A seller accepting a proper exemption certificate under this section has no duty to collect or remit the state gross retail or use tax on that purchase.
- (b) The following are the only persons authorized to issue exemption certificates:
 - (1) retail merchants, wholesalers, and manufacturers, who are registered with the department under this chapter;
 - (2) organizations which are exempt from the state gross retail tax under [IC 6-2.5-5-21](#), [IC 6-2.5-5-25](#), or [IC 6-2.5-5-26](#) and which are registered with the department under this chapter; and
 - (3) other persons who are exempt from the state gross retail tax with respect to any part of their purchases.
- (c) The department may also allow a person to issue a blanket exemption certificate to cover exempt purchases over a stated period of time. The department may impose conditions on the use of the blanket exemption certificate and restrictions on the kind or category of purchases that are exempt.

(Emphasis added).

[45 IAC 2.2-8-12](#) sets out the requirements for exemption certificates:

- (a) Exemption certificates may be issued [sic.] only by purchasers authorized to issue such certificates by the Department of Revenue. Retail merchants, manufacturers, wholesalers and others who must register with the Department of Revenue and who qualify to purchase exempt from tax under this Act [[IC 6-2.5](#)] may issue exemption certificates with respect to exempt transactions. All persons or entities not required to register with the Department as retail merchants, manufacturers, or wholesalers, and who are exempt under this Act [[IC 6-2.5](#)] with respect to all or a portion of their purchases are authorized to issue exemption certificates with respect to exempt transaction provided an exemption number has been assigned by the Department of Revenue, or provided that the Department of Revenue has specifically provided a form and manner for issuing exemption certificates without the need for assigning an exemption number.
- (b) Retail merchants are required to collect the sales and use tax on each sale which constitutes a retail transaction unless the merchant can establish that the item purchased will be used by the purchaser for an exempt purpose.
- (c) All retail sales of tangible personal property for delivery in the state of Indiana shall be presumed to be subject to sales or use tax until the contrary is established. The burden of proof is on the buyer and also on the seller unless the seller receives an exemption certificate.
- (d) Unless the seller receives a properly completed exemption certificate the merchant must prove that sales tax was collected and remitted to the state or that the purchaser actually used the item for an exempt purpose. It is, therefore, very important to the seller to obtain an exemption certificate in order to avoid the necessity for such proof. The mere filing of a Registered Retail Merchant Certificate number is not sufficient to relieve the seller of the responsibility to collect the sales tax or prove exempt use by the buyer.
- (e) No exemption certificates are required for sales in interstate commerce, however, proper records must be maintained to substantiate such sales.
- (f) An exemption certificate issued by a purchaser shall not be valid unless it is executed in the prescribed and approved form and unless all information requested on such form is completed.
- (g) An exemption certificate or other evidence supporting an exempt sale must be maintained by the seller for at least three (3) years after the due date of the tax return upon which such exempt transaction is reported.
- (h) Exemption certificates may be reproduced provided no change is made in the wording or content.

(Emphasis added).

Under IC § 6-2.5-8-8(a), a seller accepting a valid exemption certificate has no duty to collect or remit the state gross retail or use tax on a purchase. As provided by [45 IAC 2.2-8-12\(f\)](#), an exemption certificate issued by a purchaser is not valid unless it is executed in the prescribed and approved form and unless all information requested on the form is completed.

IC § 6-2.5-9-3 imposes individual personal financial responsibility and criminal liability on persons who failed to collect or remit sales tax.

An individual who:

- (1) is an individual retail merchant or is an employee, officer, or member of a corporate or partnership retail merchant; and
- (2) has a duty to remit state gross retail or use taxes (as described in [IC 6-2.5-3-2](#)) to the department; holds those taxes in trust for the state and is personally liable for the payment of those taxes, plus any penalties and interest attributable to those taxes, to the state. If the individual knowingly fails to collect or remit those taxes to the state, he commits a Class D felony.

However, Taxpayer argues that certain of its customers "have com-data, TCH, T-Check, EFS, or Fleet One cards" which these customers use at one of its four designated exempt diesel pumps. Taxpayer believes that use of one of these cards is sufficient to establish that the customer is engaged in interstate commerce and that the transactions are therefore presumptively exempt from sales tax because the customers possess a Department of Transportation ("DOT") number.

The Department finds no support for this argument; it is entirely possible that some of these card customers are exempt from sales tax and it is equally possible that some of these card customers are not exempt hence the requirement that customers provide the requisite exemption certificate. The nature of these cards makes them inherently unreliable for purposes of establishing the tax burden and they are not a substitute for properly completed exemption certificates.

The law on this issue is straightforward. Even if, as Taxpayer argues, the sales occur in interstate commerce, [45 IAC 2.2-8-12\(e\)](#) requires that "proper records must be maintained to substantiate such sales." "Unless the exemption certificate is provided, the retail merchant shall collect the state gross retail tax prescribed in this section even if the transaction is exempt from taxation under [IC 6-2.5-5](#)." IC § 6-2.5-7-3(b).

Taxpayer failed to collect properly completed exemption certificates and is now responsible for the uncollected sales tax. Taxpayer has provided no coherent argument that it should not now be responsible for paying the tax as required under Indiana law.

FINDING

Taxpayer's protest is denied.

II. Constitutional Due Process – Sales Tax Assessments.

DISCUSSION

Taxpayer believes that his constitutional guarantee of due process was given short shrift by the Department during this audit. Taxpayer states that "[t]he Department's inconsistent, incoherent and erroneous guidance on the application of the statute violates the [T]axpayer's due process rights under the federal and state constitutions."

Both the Fifth and Fourteenth Amendments prohibit governmental actions which would deprive "any person of life, liberty or property without due process of law." U.S. Const. amend. V; U.S. Const. amend. XIV. "The essential guarantee of the due process clause is that of fairness. The procedure must be fundamentally fair to the individual in the resolution of the factual and legal basis for government actions which deprive him of life, liberty or property." John E. Nowak & Ronald D. Rotunda, *Constitutional Law* p. 561 (5th ed. 1995).

Taxpayer argues that it was not provided the opportunity to examine the audit "workpapers." To the contrary, the Department concludes that during the pendency of the audit – which began February 2013 and concluded October 2013 – the audit provided Taxpayer and its representative at the time numerous opportunities to discuss the progress of the audit, to provide additional documentation as requested, to meet directly with the Department's representatives, to review the audit workpapers, and to ask any questions which Taxpayer's representatives might have. In addition, once the protest was filed, it was not the responsibility of the Department to supply Taxpayer with detailed information or to establish that the assessment was correct. Once assessed, it is Taxpayer's statutory responsibility to establish that the assessment was wrong. IC § 6-8.1-5-1(c).

Taxpayer also maintains that the Department has provided conflicting guidance concerning the exemption certificates it was required to obtain from its customers. Taxpayer states that it has been told on various occasions to accept the ST-105 and/or the ST-135 and that "the rules in effect for the prior audit were different from those in place for the years under audit, and it was the Department which grossly erred in the prior audit."

(Emphasis added). Taxpayer cites as an example Sales Tax Information Bulletin 15 (August 2009), 20090930 Ind. Reg. 045090753NRA, which provides "Exemption certificate Form ST-105 is normally used to certify exempt use." According to Taxpayer, "Contrary to this rule, the Department has issued Form ST-105 which is a separate tax return/form to be used for these sales."

The Department's form ST-105 is designated as a "General Sales Tax Exemption Certificate" while the ST-135 is labeled as a "Sales and Use Tax Exemption Certificate" for "persons engaged in public transportation." Taxpayer correctly notes that it collected both forms ST-105 and forms ST-135. However, whatever confusion may have been caused by the publication of the two exemption certificates, the audit accepted both properly completed forms and specifically notes in the audit report that, "In the future the [T]axpayer needs to obtain the correct certificate which would be either the ST-135 or the ST-105 General Sales Tax Exemption which also has a public transportation exemption available." (Emphasis added).

The Department finds nothing "fundamentally unfair" about the audit and that throughout the process the Taxpayer was provided a full and fair opportunity to participate in and contribute to the audit. Further, the Department finds nothing inherently prejudicial or unfair about allowing the Taxpayer to provide either a properly completed form ST-103 or properly completed ST-135. Whatever confusion Taxpayer may have experienced does not rise to the level of a constitutional injury.

Taxpayer makes a more serious accusation. Taxpayer claims that the assessment of tax is based on racial bias because Taxpayer "is owned and operated by persons of color," that all the "Department's personnel involved are Caucasian," and because the Department's dealings with Taxpayer have "been very aggressive and vindictive."

The sale of diesel fuel and the requirement to collect sales tax or properly completed exemption certificates has no ethnic or racial component and there is nothing in the disputed assessment which suggests otherwise. On issues related to the imposition of state sales tax, the collection and retention of properly completed exemption certificates, and the sale of diesel fuel, Taxpayer has failed to identify any statements or action which suggest any racial or ethnic prejudice whatsoever.

FINDING

Taxpayer's protest is denied.

III. Fraud Penalty.

DISCUSSION

Along with challenging the propriety of the underlying assessments, Taxpayer also challenges the decision by the Department to invoke the fraud penalty.

The fraud penalty is found at IC § 6-8.1-10-4, which states:

- (a) If a person fails to file a return or to make a full tax payment with that return with the fraudulent intent of evading the tax, the person is subject to a penalty.
- (b) The amount of the penalty imposed for a fraudulent failure described in subsection (a) is one hundred percent (100[percent]) multiplied by:
 - (1) the full amount of the tax, if the person failed to file a return; or
 - (2) the amount of the tax that is not paid, if the person failed to pay the full amount of the tax.
- (c) In addition to the civil penalty imposed under this section, a person who knowingly fails to file a return with the department or fails to pay the tax due under [IC 6-6-5](#), [IC 6-6-5.1](#), or [IC 6-6-5.5](#) commits a Class A misdemeanor.
- (d) The penalty imposed under this section is imposed in place of and not in addition to the penalty imposed under section 2.1 of this chapter.

The rule is restated in the Department's regulation at [45 IAC 15-11-4](#) which states:

The penalty for failure to file a return or to make full payment with that return with the fraudulent intent of evading the tax is one hundred percent (100[percent]) of the tax owing. Fraudulent intent encompasses the making of a misrepresentation of a material fact (See [45 IAC 15-5-7\(f\)\(3\)](#) which is known (See [45 IAC 15-5-7\(f\)\(3\)\(B\)](#)) to be false, or believed not to be true, in order to evade taxes. Negligence, whether slight or great, is not equivalent to the intent required. An act is fraudulent if it is an actual, intentional wrongdoing, and the

intent required is the specific purpose of evading tax believed to be owing.

[45 IAC 15-5-7](#) provides the elements in establish "fraud."

(3) A person who files a return which makes a false representation(s) with knowledge or reckless ignorance of the falsity will be deemed to have filed a fraudulent return. There are five elements to fraud.

(A) Misrepresentation of a material fact: A person must truthfully and correctly report all information required by the Indiana Code and the department's regulations. Any failure to correctly report such information is a misrepresentation of a material fact. Failure to file a return may be a misrepresentation.

(B) Scienter: This is a legal term meaning guilty knowledge or previous knowledge of a state of facts, such as evasion of tax, which it was a person's duty to guard against. A person must have actual knowledge of the responsibility of reporting the information under contention. However, the reckless making of statements without regard to their truth or falsity may serve as an imputation of scienter for purpose of proving fraud.

(C) Deception: Deception operates on the mind of the victim of the fraud. If a person's actions or failure to act causes the department to believe a given set of facts which are not true, the person has deceived the department.

(D) Reliance: Reliance also concerns the state of mind of the victim and is generally considered along with deception. If the person's actions, failure to act, or misrepresentations cause the department to rely on these acts to the detriment or injury of the department, the reliance requirement of fraud will be met.

(E) Injury: The fraud instituted upon the department must cause an injury. This can be satisfied simply by the fact that the misrepresentation(s) caused the department not to have collected the money which properly belongs to the state of Indiana.

In order to demonstrate fraud, the department is required to prove all of the above elements are present. This must be shown by clear and convincing evidence.

(Emphasis added).

Assuming for the moment that the proposed assessment of sales tax was correct, the issue is whether the assessment of the fraud penalty was also correct.

The Department concludes that: (1) Taxpayer misrepresented a "material fact" because it "did not truthfully and correctly report all information required by the Indiana Code and the department's regulations." (2) Taxpayer possessed the requisite "scienter" because it had the necessary "knowledge or previous knowledge of a state of facts." The pending audit assessment is now the second audit during which Taxpayer failed to collect sales tax on the sale of diesel fuel. This first audit was issued February 2010 and a supplemental audit was issued October 2011. This is now the second time in which Taxpayer's protest was heard and addressed after Taxpayer was specifically cautioned that it was required to either collect sales tax on the sale of diesel fuel or to obtain properly completed exemption certificates. (3) Taxpayer practiced deception when it represented as exempt those sales of diesel fuel which were clearly not exempt. For example, the blind acceptance of an exemption certificate purportedly signed by President Obama is a clear misrepresentation of a material fact. (4) The Department relied on Taxpayer's good faith and reasonable business practices in collecting sales tax on the sale of millions of dollars of diesel fuel. (5) The Department of Revenue – and more importantly, the citizens of this state – were "injured" because Taxpayer's multiple errors and omissions "caused the department not to have collected the money which properly belongs to the state of Indiana."

FINDING

Taxpayer's protest of the fraud penalty is denied.

SUMMARY

Taxpayer's protest is denied in its entirety.

